

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
) CSR-8852-M
Hawaii Catholic TV, Inc. ) Docket No. 13-277
Licensee of Station KUPU(DT), )
Waimanalo, Hawaii )
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 2014

Released: April 14, 2014

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Hawaii Catholic TV, Inc., ("HCTV"), licensee of full-power commercial television station KUPU(DT), Waimanalo, Hawaii ("KUPU"), filed a must carry complaint pursuant to Sections 76.7 and 76.61 of the Commission's rules seeking carriage on the cable systems of Time Warner Entertainment Company, L.P., d/b/a Oceanic Time Warner Cable ("Oceanic"), serving the Honolulu designated market area. Oceanic filed an opposition to this complaint to which HCTV replied after seeking an unopposed extension of time. For the reasons stated below, we grant in part and deny in part HCTV's complaint, but separate certain viewability claims HCTV has made against Oceanic for further consideration.

II. BACKGROUND

1. Pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"), and the implementing rules adopted by the Commission, local commercial television broadcast stations, such as KUPU, are entitled to assert mandatory carriage rights on cable systems located within their market. A

1 Must-Carry Complaint by Hawaii Catholic TV, Inc., filed Nov. 12, 2013 ("Complaint").

2 47 C.F.R. §§ 76.7 and 76.61.

3 See Opposition to Must Carry Complaint of Oceanic Time Warner Cable LLC ("Opposition"), filed Dec. 9, 2013; HCTV/KUPU Motion for Extension of Time, filed Dec. 23, 2013; Reply to Opposition to Must Carry Complaint of HCTV/KUPU ("Reply"), filed Jan. 6, 2013. Comments in support of HCTV/KUPU were also received in this matter from both the Governor and the Diocese of Honolulu. See Letter of Neil Abercrombie, Governor, State of Hawaii to Marlene Dortch, Secretary, FCC, Apr. 3, 2014; Letter from Most Reverend Larry Silva, Bishop of Honolulu, to Marlene Dotch, Secretary, FCC, Apr. 7, 2014.

4 See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2975-77, ¶¶ 41-46 (1993) ("Must Carry Order"). The Commission has subsequently extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and has amended its rules accordingly. See Carriage of Digital Television Broadcast Signals First Report and Order, See 16 FCC Rcd 2598, 2606, ¶¶ 15-16, 2610 ¶ 28 (2001) ("DTV Must Carry Order"); see also 47 C.F.R. §76.64(f)(4).

station's market for this purpose is its "designated market area," or DMA, as defined by The Nielsen Company.<sup>5</sup>

2. KUPU is a local commercial television station, licensed to Waimanalo, Hawaii on the Island of Oahu, and like all stations on all the islands of Hawaii, is assigned by The Nielsen Company to a single designated market area - the Honolulu DMA.<sup>6</sup> On Sept. 20, 2011, KUPU elected mandatory carriage on all of Oceanic's cable systems serving the Honolulu DMA for the current carriage cycle, and it thereafter demanded carriage on Oceanic's systems in August 2013.<sup>7</sup> Oceanic denied carriage of KUPU on all its cable systems outside the Island of Oahu on the ground the station did not deliver a good quality signal to the headends associated with each its systems operating on the other islands.<sup>8</sup> However, with respect to its Oahu cable system, Oceanic conceded that based on KUPU's signal quality, it would carry the station in digital format on channel 56.<sup>9</sup> In only carrying the station digitally and not in analog, it argued it was complying with recent Commission rule changes that no longer required it to downconvert KUPU to analog format for its subscribers.<sup>10</sup> HCTV asserts it complied with the Commission's must carry notice and demand requirements for Oceanic's cable systems serving the Honolulu DMA, and that as a consequence KUPU should be carried through the end of the current carriage cycle (December 31, 2014) to all of Oceanic's cable subscribers on all of its systems – including those subscribers with only analog receivers.

### III. DISCUSSION

#### A. Headend Designation Issues

3. HCTV argues Oceanic should not be allowed to assert that each of its cable systems serving each Hawaiian island has its own 'principal headend,' as this runs counter to the way Oceanic operates its systems.<sup>11</sup> It asserts that almost ten years ago, Oceanic had openly announced it had replaced its four headends on each of the other four islands with a master headend on Oahu "that gathers all the signals -- whether broadcast, over the air or downloaded from satellites -- and processes them just one time, then sends them via a fiber-optic network to receive sites close to the HFC (Hybrid Fiber Coax) plants serving their customers on the four islands."<sup>12</sup> Furthermore, HCTV argues that during a December 2011 hearing

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<sup>5</sup> Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by The Nielsen Company. 47 C.F.R. § 76.55(e)(2).

<sup>6</sup> Complaint at 2-3.

<sup>7</sup> *See* Complaint at 1 & Exh. 1, Letter of D. Francis Laidlaw, General Manager, HCTV to Bob Barlow, President, Time Warner Entm't Co., L.P., at 1-2 (Aug. 13, 2013).

<sup>8</sup> *See* Complaint at 3, citing Exh. 2, Letter from Bob Barlow, Oceanic to D. Francis Laidlaw, General Manager, HCTV, Sept. 12, 2013 ("Oceanic Denial Letter") (conceding KUPU did deliver a good quality signal to Oceanic's Oahu headend).

<sup>9</sup> *See id.*

<sup>10</sup> *See* Complaint at 2 & Exh. 2, Oceanic Denial Letter.

<sup>11</sup> Complaint at 3 & 4.

<sup>12</sup> Complaint at 3 & n.2, citing Hawaii, Fiber-Optic Style, TV Technology, Nov. 12, 2003, *available at* <http://www.tvtechnology.com/news/0110/hawaii-fiber-optic-style/184853#sthash.yTQRUHAH.dpuf> (also stating "the entire installation also allows Oceanic Time Warner Cable to control, operate and monitor the entire operation,

on the renewal of Oceanic's franchises for the island of Hawaii, Bob Barlow, President of Oceanic, advised Hawaii's Department of Commerce and Consumer Affairs's Cable Advisory Committee that "[Oceanic] views the whole state as one system and provides the exact same service throughout the state."<sup>13</sup> HCTV states that for Oceanic to now argue that each headend it has on its outer islands is in fact a "principal headend" would run counter to the requirement of the Commission's rule that no cable operator use headend designation to "undermine or evade" the must-carry requirements.<sup>14</sup> HCTV argues Oceanic is clearly capable of, and in fact does, receive over-the-air signals of other Honolulu stations at its Oahu headend and distributes them to the other islands, as well as receives outer-island signals, transmitting them to Oahu for processing and retransmitting them back to the outer islands.<sup>15</sup>

4. Oceanic responds that it still has five separate and distinct cable systems serving the Honolulu DMA, one each serving the islands of Kauai, Maui and Oahu and two systems each serving the eastern and western portions of the Island of Hawaii, and that these headends have historically existed in their locations since at least 2003.<sup>16</sup> Furthermore, Oceanic asserts each of its systems' designated principal headends contain significant processing, transmission and other operations equipment, and that it engages in signal processing and distribution activities at each of these headends.<sup>17</sup> Oceanic asks us to note that HCTV does not dispute Oceanic's signal studies showing that KUPU cannot deliver a good quality over-the-air signal to its island headends other than Oahu.<sup>18</sup> Oceanic argues, HCTV wants to force Oceanic to redesignate Oceanic's Oahu principal headend as the principal headend for all its systems, hoping to thereby trigger carriage throughout all of the different island systems.<sup>19</sup>

5. The Commission has stated that a cable system may designate its own principal headend, provided that its choice is reasonable and is not made in order to circumvent must-carry obligations imposed by the 1992 Act.<sup>20</sup> We have also permitted cable operators to designate their principal headends even when there may be another receive site controlled by the operator that is more convenient to the broadcaster.<sup>21</sup> Factors we consider in judging reasonableness include whether the headend serves the

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across the four islands, using Scientific-Atlanta's PC-driven TNCS (Transmission Network Control System) software from the master headend.").

<sup>13</sup> Complaint at 4 & n.4, citing Cable Advisory Committee, Department of Commerce and Consumer Affairs, State of Hawaii, Minutes of December 12, 2011 Meeting at §II(B), p.2, available at [http://files.hawaii.gov/dcca/catv/cable\\_advisory\\_committee/CAC-minutes-meeting-12-12-2011-final-01-11-2012.pdf](http://files.hawaii.gov/dcca/catv/cable_advisory_committee/CAC-minutes-meeting-12-12-2011-final-01-11-2012.pdf)

<sup>14</sup> Complaint at 4 & n.5, citing 47 C.F.R. § 76.5(pp)(2).

<sup>15</sup> Complaint at 5 & n.6.

<sup>16</sup> Opposition at 2, n.3, 5 & 6 (Oceanic notes the Maui system also serves the islands of Lanai and Molokai). Furthermore, Oceanic asserts each cable system is separately franchised and separately regulated by the state of Hawaii; each system has a unique FCC Physical System Identification number, files its own separate Form 325 annual report and identifies the location of its principal headend in the public file; each system has its own channel lineup with a unique mix of local broadcast stations and system specific local programs; each system has its own specific public, educational and government (PEG) programming with such programming provided by a different nonprofit organization for each island; each system files its own bi-annual compulsory copyright filings. *See id.* at 5-6 & nn.12-20.

<sup>17</sup> Opposition at 6-7.

<sup>18</sup> Opposition at 2 & n.4, citing Complaint at Exh.2 and attached signal test results.

<sup>19</sup> Opposition at 3.

<sup>20</sup> *Minority Television Project, Inc. v. AT&T Broadband, LLC*, 17 FCC Rcd 22810, 14392 ¶ 6 & n.25, citing *Must Carry Order*, 8 FCC Rcd at 2968 ¶ 9 (MB 2002).

<sup>21</sup> *See id.* at 22812 ¶ 6 & n.17, citing cases.

majority of subscribers, accommodates the majority of the signal processing equipment, and is near the center of the cable system,<sup>22</sup> as well as whether headends have historically been associated with systems.<sup>23</sup> Oceanic files the declaration of Bob Barlow, its Regional Vice President of Operations, averring to the truth of its statement in its pleading that “[Oceanic’s] Hawaiian operations also engage in signal processing and distribution activities at multiple locations, including both the historic principal headend locations, but also at the Oahu location.”<sup>24</sup> Therefore, we agree that Oceanic is permitted to designate each of its headends serving the outer islands as legitimate principal headends, and although we do not grant carriage to KUPU outright for Oceanic systems other than Oahu – where it is currently carried - there is nothing preventing HCTV from using alternative means to deliver its signal to each of these principal headends, if it seeks carriage on each and every system in its market, as it is permitted to do under our rules.<sup>25</sup>

## B. Viewability Claims

6. In preparation for the digital television transition, in 2007, the Commission adopted a Viewability Rule requiring cable operators with hybrid systems<sup>26</sup> to carry must-carry signals<sup>27</sup> in both digital and analog format to ensure that no analog cable subscribers would lose access to must-carry stations in the wake of the broadcast digital television transition.<sup>28</sup> In 2012, the Commission re-interpreted the statutory viewability requirement so as to permit cable operators to move channels out of analog and into digital-only format and instead to require their subscribers to use of set-top equipment to view must-carry signals, provided that they make such equipment both available and affordable (or provide it at no cost).<sup>29</sup> Therefore, effective December 13, 2012, until it completes its transition to all-digital service, a hybrid cable system operator may comply with the statutory viewability requirement by

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<sup>22</sup> *LeSEA Broad. Corp. v. Cox Comms. Kansas, L.L.C.*, 19 FCC Rcd 6218, 6220 ¶ 5 (MB 2004).

<sup>23</sup> *See Minority Television*, 17 FCC Rcd at 22813 ¶ 6.

<sup>24</sup> *See Opposition at 7 & Declaration of Bob Barlow, Regional Vice President of Operations for Oceanic Time Warner Cable, LLC.*

<sup>25</sup> *See, e.g.*, 47 C.F.R. § 76.55(c)(3).

<sup>26</sup> A hybrid system is a cable system that offers both analog and digital cable service to its subscribers. By contrast, an analog-only system or all-digital system provides only analog or digital service, respectively.

<sup>27</sup> Section 614(a) of the Communications Act provides that “[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided in this section.” 47 U.S.C. § 534(a). Section 615(a), 47 U.S.C. § 535(a), imposes a similar requirement to carry “the signals” of qualifying non-commercial television stations. These provisions are known as the “must carry” provisions of the Communications Act. *See* 47 U.S.C. §§ 534, 535.

<sup>28</sup> *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21065, ¶ 2 (2007) (“*Third Report and Order*” or “*Third Further Notice*”); *see also* 47 C.F.R. §§ 76.56(d)(3) – (5) (2008). We note that cable operators that transition to an all-digital system may carry the signal only in digital format. *Id.* at 21070, ¶ 15.

<sup>29</sup> *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No 98-120, Fifth Report and Order, 27 FCC Rcd 6529, 6537, ¶ 11 (2012) (“*Viewability Order*”). The Commission sought to “provide hybrid cable system operators the flexibility to best meet the needs of their subscribers during their move to an all-digital system.” *Id.* at 6545, ¶ 18. On December 27, 2013 the United States Court of Appeals for the District of Columbia Circuit upheld the *Viewability Order*. *See Agape Church, Inc. v. FCC*, No. 12-1334, slip op. at 6 (D.C. Cir. Dec. 27, 2013) (“The FCC’s new rule allowing cable operators to offer analog subscribers equipment in lieu of downconversion was within its authority under the statute, supported by reasoned decisionmaking, and properly promulgated pursuant to notice and comment rulemaking procedures in which interested parties should have anticipated that the change was possible.”).

carrying a must-carry signal in a format that is capable of being viewed by analog customers either (1) without the use of additional equipment or (2) alternatively with equipment made available by the cable operator at no cost or at an affordable cost that does not substantially deter use of the equipment.<sup>30</sup> Cable operators are also required to provide advance notice to affected broadcasters and subscribers before terminating analog carriage.<sup>31</sup> However, as the Commission envisioned in approving the sunset of the viewability requirement, after a cable system transitioned to digital, a “must-carry signal carried only in digital format would still be included in the basic service tier [and] analog cable subscribers would not be required to subscribe to an enhanced tier of service to view the digital version of a must-carry channel.”<sup>32</sup>

7. KUPU is a must-carry signal that would ordinarily need to be made available on Oceanic’s basic tier and be viewable by all subscribers to Oceanic’s Oahu system.<sup>33</sup> HCTV notes that Oceanic’s denial letter advised it that with respect to KUPU’s signal, “FCC rule changes... no longer require cable operators to downconvert digital television signals into analog format.”<sup>34</sup> At the time it filed its complaint, HCTV asserted it was particularly concerned that Oceanic’s reference to the sunset of the Commission’s “viewability rule” may have indicated an intention on Oceanic’s part to withhold KUPU from some of its subscribers by preventing, or imposing technical barriers to, the delivery of a viewable KUPU signal.<sup>35</sup> In its Opposition, Oceanic responded that its systems remained in full compliance with the Commission’s *Viewability Order*, and it attached an exhibit containing two notices published in the Hawaii Star-Advertiser and its website in mid-September and mid-October, 2013, both of which state that:

On Oahu, beginning 10/16/13, KUPU-TV will be added to the Basic (Digital-only) tier on Ch. 56. Customers may require special equipment to receive KUPU-TV on older analog television sets not already connected to a cable box or CableCARD device. Such equipment is available for lease from Time Warner Cable. Please call...<sup>36</sup>

8. In reply, HCTV argues Oceanic’s subscriber notice fails to comply with the notice requirements of the *Viewability Order* for varying reasons.<sup>37</sup> First, it argues that Oceanic’s website fails

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<sup>30</sup> *Viewability Order*, 27 FCC Rcd at 6545, ¶ 18. The Commission determined that a monthly cost of \$2 or less for digital equipment would meet the affordability requirement. *Id.* at 6541, ¶ 14.

<sup>31</sup> See *Viewability Order*, 27 FCC Rcd at 6544, n.89, ¶ 17; see also 47 C.F.R. §76.1601 (requiring cable operators to “provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.”); 47 C.F.R. § 76.1630(b) (requiring cable operators (i) to notify customers of any changes in rates, programming services or channel positions “as soon as possible in writing”; (ii) to give customers notice at least 30 days in advance of such changes if the change is within the control of the cable operator; and (iii) to notify subscribers 30 days in advance of any significant changes in other information listed in Section 76.1602).

<sup>32</sup> See *Viewability Order*, 27 FCC Rcd at 6542, ¶ 15.

<sup>33</sup> The 1992 Cable Act was clear in its requirement that all local commercial television stations carried in fulfillment of the must-carry requirements had to be provided to every cable subscriber and be viewable on all television sets, and cable operators have typically complied with this requirement by making such must carry stations available on the basic service tier – a level of service to which a viewer must subscribe to be eligible for access to any other tier of service. See *Must Carry Order* 8 FCC Rcd at 2974, ¶¶ 34; see also *Viewability Order*, 27 F.C.C.R. at 6532 ¶ 7 & n.21 & 6535, ¶ 9.

<sup>34</sup> Complaint at 5 & Exh.2, Denial Letter.

<sup>35</sup> Complaint at 6

<sup>36</sup> Opposition at 8 & Exh. N

<sup>37</sup> Reply at 3.

to disclose the price of equipment necessary to receive the digital Basic Level of service (the service itself costs \$18.03 per month); however, KUPU argues it does not appear to be included in Oceanic's Basic service tier, and instead will only be available as part of Oceanic's "Standard" digital package (\$63.30 per month), which is the only package HCTV can identify as available to analog subscribers.<sup>38</sup> Accordingly, HCTV concludes that requiring subscribers to accept a service package that carries an additional annual premium of \$600 just to receive KUPU – a must carry station that should be on the basic tier, is plainly contrary to the *Viewability Order's* prescription that cable operators make reception equipment available at "no cost or an affordable cost."<sup>39</sup> It also questions why KUPU, as a must carry station, should not be included in the Basic Tier of service provided to all subscribers.

9. Because the current record is insufficient to determine whether Oceanic complied fully with its obligations and commitments under the *Viewability Order*, we will defer consideration of that issue until a more complete record is amassed. In this regard, we will send Oceanic a letter requesting supplemental information concerning Oceanic's carriage of KUPU and its compliance with the *Viewability Order*. That letter will also be served on HCTV, which will be given the opportunity to respond to Oceanic's supplemental information.

### C. First Amendment Claim

10. In its Opposition, Oceanic also argues that mandating carriage of KUPU well beyond its natural market of Oahu on the other islands violates Oceanic's First Amendment rights.<sup>40</sup> The Supreme Court upheld the must carry provisions against First Amendment scrutiny in *Turner Broadcasting, Inc. v. F.C.C.*<sup>41</sup> Contrary to Oceanic's assertions, the Second Circuit in *Cablevision Systems Corporation v. F.C.C.*, reaffirmed that the Cable Act established a station's right to carriage throughout its DMA, not just in a portion,<sup>42</sup> and all of the islands of Hawaii consist of one, single DMA. However, given that we've determined that KUPU does not have to be carried on systems to whose principal headend it does not deliver a good quality signal – currently all principal headends outside of Oahu, Oceanic's First Amendment arguments are moot. In the future, if KUPU is able to provide a good quality signal by any means to an Oceanic principal headend other than Oahu, Oceanic is free to reassert its First Amendment claims.

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<sup>38</sup> *Id.* at 3-4 & 5.

<sup>39</sup> *Id.* at 3 & 5.

<sup>40</sup> Opposition at 9.

<sup>41</sup> *See, e.g., Turner Broad., Inc. v. F.C.C.*, 520 U.S. 180 (1997).

<sup>42</sup> *Cablevision Systems Corp. v. FCC*, 570 F.3d 83, 95 ¶ 11 (citing 47 U.S.C. § 534(a)-(b), (h)(1)(C)).

**IV. ORDERING CLAUSE**

11. Accordingly, **IT IS ORDERED** that pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Sections 76.7 and 76.61 of the Commission's rules, 47 C.F.R. §§ 76.7, 76.61, the must carry complaint filed by Hawaii Catholic TV, Inc., licensee of full-power commercial television station KUPU(DT), Waimanalo, Hawaii, seeking carriage on certain Hawaii cable systems operated by Time Warner Entertainment Company, L.P., d/b/a Oceanic Time Warner Cable **IS GRANTED IN PART and DENIED IN PART**, as discussed above, as to the cable systems operated by Oceanic Time Warner Cable.

12. This action is taken under authority delegated by Section 0.283 of the Commission's rules.<sup>43</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Senior Deputy Chief, Policy Division  
Media Bureau

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<sup>43</sup> See 47 C.F.R. § 0.283.